Supreme Court, U.S.
FILED
APR 23 1999
CLERK

No. 98-1529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HESTER INDUSTRIES, INC.,

Petitioner,

v.

TYSON FOODS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN J. CLEARY
SHUGHART THOMSON & KILROY
Twelve Wyndotte Plaza
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355

JONATHAN J. LERNER
Counsel of Record
CHRISTOPHER P. MALLOY
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Attorneys for Respondent

152593

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

24pp

COUNTER-STATEMENT OF QUESTION PRESENTED

1. Can a party be held in contempt of a "so ordered" stipulation of dismissal that contains no directive to the parties, specifically provides that "no judgment" would be entered, and is entered "pursuant to" a stipulated settlement agreement in which the parties unequivocally agreed that the court would enter no "injunction, or order for injunctive relief?"

STATEMENT PURSUANT TO RULE 29.6

Tyson Foods, Inc. has no parent corporations or nonwholly owned subsidiaries, other than the following: Offshore Ventures, Inc., T-PM Holding Company, Trasgo, S.A. de C.V., Shanghai Ocean Wealth Products Corp., Fil-Am Foods, Inc., Filagri Holdings, Inc., Cobb Progenitoras, S.A. de C.V., Cobb Sertanejo Agro — Industrial, Ltda., Gen Ave, S.A., Guangzhou Suiing Cobb Grand Parent Breeder Farm, Matsusaka Farm Co., Ltd., Phil-American Poultry Breeders, Inc., Ping Shan Cobb-Vantress, Ltd., Progenitores Avicola, C.A., P.T. Cobbindonasa Nunggal, Venco Research and Breeding Farm, Ltd., and Cobb-Espanola, S.A.

TABLE OF CONTENTS

	Page
Counter-Statement of Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Rule Involved	1
Counter-Statement of the Case	2
Reasons for Denying the Writ	8
I. The Court Of Appeals' Decision Is Not Final.	8
II. The Court Of Appeals' Decision Does Not "Conflict" With *Kokkonen* Or Any Circuit Decision.	9
A. No Court Has Ever Held That Retaining Jurisdiction Over A Settlement Agreement Transforms Every Breach Into A Contempt	10
B. The Dismissal Order Did Not "Incorporate" The Terms Of The Settlement Agreement	14

Contents

Page

III. The Court Of Appeals' Alternative Rationale Presents No Issues For Review. 14

Conclusion 17

TABLE OF CITED AUTHORITIES

Page

Cases:

American Constr. Co. v. Jacksonville, 148 U.S. 372 (1893) 8

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967) . 8

Consumers Gas & Oil, Inc. v. Farmland Indus., Inc., 84 F.3d 367 (10th Cir. 1996) 12, 13, 15

D. Patrick Inc. v. Ford Motor Co., 8 F.3d 455 (7th Cir. 1993) 13

Erhardt v. Prudential Group, Inc., 629 F.2d 843 (2d Cir. 1980) 11

Fonar Corp. v Deccaid Servs., Inc., 983 F.2d 427 (2d Cir. 1993) 11

H.K. Porter Co. v. National Friction Prods. Corp., 568 F.2d 24 (7th Cir. 1977) 15

In re Peck, 155 B.R. 301 (Bankr. D. Conn. 1993) .. 12

International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64 (1967) 16

Interspiro USA, Inc. v. Figgie Int'l Inc., 18 F.3d 927 (Fed. Cir. 1994) 12

Cited Authorities

Page

King v. Allied Vision, Ltd., 65 F.3d 1051 (2d Cir. 1995) 11, 15

Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375 (1994) 9, 10, 11, 12, 13

Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, 32 F.2d 195 (2d Cir. 1929) 5

Lucille v. City of Chicago, 31 F.3d 546 (7th Cir. 1994) 12

NBA Properties, Inc. v. Gold, 895 F.2d 30 (1st Cir. 1990) 11

United States v. GAF Corp., 928 F.2d 1253 (2d Cir. 1991) 5

Virginia Military Institute v. United States, 508 U.S. 946 (1993) 8

William Keeton Enters., Inc. v. A All Am. Strip-O-Rama, Inc., 74 F.3d 178 (9th Cir. 1996) 15

Rules:

Fed. R. Civ. P. 41 ..... 1, 6, 15

Fed. R. Civ. P. 65 15

Sup. Ct. R. 10 ..... 8, 15

Cited Authorities

Page

Other Authority:

Black's Law Dictionary 785 (6th ed. 1990) 16

Respondent Tyson Foods, Inc. ("Tyson") respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

RULE INVOLVED

Rule 41(a) of the Federal Rules of Civil Procedure:

> (a) Voluntary Dismissal: Effect Thereof.
>
> (1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.
>
> (2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a

> defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

COUNTER-STATEMENT OF THE CASE

The district court in this case erroneously imposed a civil contempt fine of $8,599,272.84 against Tyson for violating a "Stipulated Order of Dismissal" (the "Dismissal Order"). The Dismissal Order contained no order, operative command or edict that was or could be violated, specifically provided that "no judgment" would be entered, and was entered "pursuant to" a stipulated settlement agreement (the "Settlement Agreement") in which the parties unequivocally agreed that the court would enter no "injunction, or order for injunctive relief." (Pet. at 70a, 74a ¶ 6)

The United States Court of Appeals for the Second Circuit recognized the multiple reasons why contempt was inappropriate and vacated the district court's judgment to the extent it imposed the contempt fine. In its Petition, Hester fails to note that the court of appeals' decision, which ordered a remand to the district court, is not final. In its complaint, Hester had also asserted claims for breach of contract, trademark dilution, trademark infringement, unfair competition and tortious interference with contractual and prospective business relations. Hester abandoned these claims at trial, and the district court, recognizing that the contempt claim was the only claim Hester had tried, determined that

contempt was the only claim to be decided.[1] (Pet. at 39a) The court of appeals remanded the case to the district court for a determination whether the district court's findings of fact on damages could be applied to any of those claims. (Pet. at 12a-13a) Although Hester cannot prove its right to recover any damages on the remaining claims, this case will not become final until the district court makes a ruling to that effect.

While Hester may be disappointed by the loss in the court of appeals of its windfall contempt award, there is nothing about this case that would remotely justify any review, much less an interlocutory review, by this Court. The court of appeals' decision on the contempt issue was entirely correct and unremarkable, raises no important issues of federal law, does not conflict with any decision of this Court and creates no division among the courts of appeals.

* * * *

In the Settlement Agreement, which resolved trademark litigation then pending before the district court, without

---

1. In its Petition, Hester mischaracterizes the proceedings before the district court by stating that it "reserved decision" on the remaining claims. (Pet. at 5) In fact, recognizing that Hester had abandoned all claims other than contempt, the district court stated:

> After a bench trial, and after a full review of the record in this case, the Court has determined that the sole claim to be decided by this Court is whether or not, and to what extent, Tyson violated the stipulated Order of Dismissal. . . .

(Pet. at 39a)

admitting infringement, Tyson contractually agreed "to stop all use of the mark WING FLINGS in association with poultry products. . . ." (Pet. at 72a) The parties provided that the prior litigation would be dismissed by stipulation — not by court order. Indeed, paragraph six of the Settlement Agreement specifically provided that the case would be dismissed "by stipulation of the parties *without the entry of any judgment, injunction, or order for injunctive relief.*" (Pet. at 74a) Moreover, the Settlement Agreement provided for only limited continuing jurisdiction in the district court to subject the Settlement Agreement to "enforcement by specific performance." (Pet. at 74a ¶ 6) An order of specific performance is an equitable remedy for breach of certain agreements which would be entirely superfluous if the Settlement Agreement already was immediately enforceable by contempt, as the district court held.

In keeping with the Settlement Agreement on which it was based, the Dismissal Order specifically excluded the entry of any judgment, did not contain any command directing the parties to do anything, does not contain an injunction, and does not "incorporate" the Settlement Agreement. Rather it states only as follows:

> Pursuant to Rule 41 of the Federal Rules of Civil Procedure and in accordance with the terms of the attached Settlement Agreement between the parties, this action is hereby dismissed with prejudice, including all claims or causes of action asserted herein. Further, pursuant to the agreement of the parties in settlement, no judgment against either party will be entered and all parties will bear their own costs and attorneys fees.

(Pet. at 70a) Significantly, while the district judge "So Ordered" the Dismissal Order, (Pet. at 70a-71a), the Settlement Agreement itself was not "So Ordered." Even if it had been, however, the district court would have "so ordered" that no "injunction, or order for injunctive relief," would be entered.

Hester asserts that there is extrinsic "evidence" that the parties intended to "incorporate" the Settlement Agreement into the Dismissal Order. This "evidence" was properly ignored by both the district court and the court of appeals and can be safely disregarded by this Court. First, Hester has improperly included in its Petition a transmittal letter that was never admitted into evidence (and was not drafted by Tyson's attorneys) in which Hester claims the parties requested the district judge to approve the Settlement Agreement. (Pet. at 106a) Even if properly considered, however, the district judge was requested in the letter only to enter the Dismissal Order — not to "order" the Settlement Agreement. *Id.* Second, Hester claims that Tyson admitted in its original answer that the Settlement Agreement was incorporated in the Dismissal Order, but relegates to a footnote the fact that the original answer was withdrawn, along with any binding effect of the admission.[2] (Pet. at 5 n.2)

The district court addressed the language in the Stipulated Order of Dismissal and Settlement Agreement in an August

---

2. "When a pleading is amended or withdrawn, the superseded portion *ceases to be a conclusive judicial admission*." *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter*, 32 F.2d 195, 198 (2d Cir. 1929); *see also United States v. GAF Corp.*, 928 F.2d 1253, 1259 (2d Cir. 1991).

8, 1994 opinion granting Hester partial summary judgment and holding Tyson in contempt. The district court did not consider any of the extrinsic evidence which Hester points to in its Petition as proof that the Settlement Agreement was incorporated in the Dismissal Order. Rather, the district court construed the order as a matter of law, erroneously holding: "In this case, it is clear that the order is clear and unambiguous. It incorporates all the terms of the settlement agreement signed by the parties. . . ." (Pet. at 20a) The district court incorrectly reasoned that the terms of the parties' Settlement Agreement "were conditions approved by the Court through the dismissal order." (Pet. at 19a)

The district court held a ten-day bench trial commencing on January 14, 1997 and, on July 29, 1997, issued findings of fact and conclusions of law. While there were six causes of action in the case, Hester only introduced evidence on the contempt claim. Recognizing that Hester had abandoned the remaining claims, the district court "determined that the sole claim to be decided . . . is whether or not, and to what extent, Tyson violated the stipulated Order of Dismissal. . . ." (Pet. at 39a) Although Hester had not shown that it had been injured in any respect by Tyson's conduct, the district court proceeded to calculate a "compensatory" fine, based on the profits it determined Tyson had earned on the sale of chicken wings in violation of the Dismissal Order. The district court ultimately awarded a total of $8,599,272.84 to Hester based on this theory.

The United States Court of Appeals for the Second Circuit correctly reversed the district court's judgment on two independent grounds. First, the court of appeals held that the Stipulated Order of Dismissal was a dismissal by stipulation under Rule 41(a)(1)(ii) and the district court thus had no authority to condition the dismissal on the parties' compliance

with the Settlement Agreement. (Pet. at 10a) The court of appeals noted that the parties had mutually agreed to the dismissal and no court action was needed to effectuate the dismissal. *Id.* Accordingly, the district court had no authority to order the parties to comply with the Settlement Agreement under threat of contempt. *Id.* Second, the court of appeals recognized that the parties had expressly provided in the Settlement Agreement that the case would be dismissed without the "entry of any judgment, injunction, or order for injunctive relief" and held that to construe the Stipulated Order of Dismissal as an order compelling the parties to comply with the Settlement Agreement would be tantamount to an injunction, in contravention of the parties' express agreement. (Pet. at 11a)

The court of appeals remanded the case to the district court in accordance with the following instructions:

> Even though the district court lacked a valid basis for the contempt finding, the court meticulously made findings of fact during the course of several hearings. These findings on ill-gotten gains damages may be applied to one or more of the remaining causes of action, such as breach of contract or Lanham Act claims, if the findings are germane to the particular cause upon which liability is predicated.

(Pet. at 12a) Addressing Hester's cross appeal, the court of appeals also "invited" the district court to

> revisit the time period during which Tyson was out of compliance [with the Settlement Agreement] should it determine to apply its

> findings on damages to one or more of the remaining causes of action.

(Pet. at 13a) While it is clear from the record that Hester suffered no compensable damages on the claims remaining in the case, the district court has not yet ruled on the remanded issues and this case is not final.

REASONS FOR DENYING THE WRIT

Rule 10 of the Supreme Court Rules begins by stating: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Hester does not even mention the standards for granting a writ of certiorari, let alone satisfy them.

I.

THE COURT OF APPEALS' DECISION IS NOT FINAL.

Because the court of appeals remanded the case to the district court for further proceedings, this case is not final and is not ripe for review by this Court. *See Virginia Military Institute v. United States*, 508 U.S. 946, 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *American Constr. Co. v. Jacksonville*, 148 U.S. 372, 384 (1893) ("[T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals on

appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.").

The court of appeals remanded this case only for the purpose of allowing the district court to rule on whether its prior findings of fact on damages could be applied to the remaining claims in the case. Given the limited nature of the remand, there will be no great "inconvenience" or "embarrassment" to the parties if further review is deferred until a final decision. Regardless of which way the district court rules, the remand may raise additional or different issues for review. It would be a waste of judicial resources to hear the matter piecemeal. Finally, as discussed below, there is nothing remarkable about this case that warrants review by this Court, much less anything that justifies this Court in deviating from its usual practice of denying interlocutory review.

II.

THE COURT OF APPEALS' DECISION DOES NOT "CONFLICT" WITH *KOKKONEN* OR ANY CIRCUIT DECISION.

There is nothing in the court of appeals' decision in this case that conflicts with this Court's opinion in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994) or any decision of another Circuit court. *Kokkonen* was a decision dealing not with contempt, but with the threshold question of a federal court's subject matter jurisdiction to entertain a motion to specifically enforce a settlement agreement. In *Kokkonen*, this Court held that federal courts lack inherent jurisdiction to specifically enforce settlement

agreements settling federal actions and a motion to enforce a settlement agreement must therefore be supported by its own basis for jurisdiction. *Id.* at 378. The jurisdictional issue in *Kokkonen* is not implicated in this case because there was independent subject matter jurisdiction under, among other things, the diversity statute. (Pet. at 94a)

The thrust of Hester's Petition appears to be its contention that in settling a case by stipulation, the parties should be able to agree to the entry of an order which would permit a district court to enforce the agreement by contempt if one party breaches. This Court recognized in *Kokkonen* that, in order to retain jurisdiction, the district court could embody the parties settlement agreement in an order "if the parties agree." 511 U.S. at 381-82. It certainly did not suggest, much less hold, that a provision retaining jurisdiction always converts a settlement agreement into an order punishable by contempt. Conversely, the court of appeals did not hold that an order dismissing a case could never result in contempt. It simply held that the parties had not agreed to have the Settlement Agreement incorporated into the Dismissal Order or converted into a consent decree. (Pet. at 11a n.2) In reality, Hester is asking this Court to reevaluate the court of appeals' construction of the Dismissal Order and Settlement Agreement, which presents no important issue of federal law.

A. No Court Has Ever Held That Retaining Jurisdiction Over A Settlement Agreement Transforms Every Breach Into A Contempt

Hester reads *Kokkonen* as creating a new rule under which any violation of a settlement agreement is a contempt of court, "if *either* the settlement agreement was incorporated in the order *or* the court retained jurisdiction over the agreement." (Pet. at 8) However, there is nothing in this Court's opinion — which

nowhere mentions contempt much less drastically expands its reach — that would convert a provision retaining jurisdiction into one automatically transforming every settlement agreement into an injunction, violation of which is punishable by contempt. Indeed, neither *Kokkonen*, nor any other case cited by Hester, dispensed with the basic prerequisites of any contempt finding that the underlying order be "clear and unambiguous," *Fonar Corp. v Deccaid Servs., Inc.*, 983 F.2d 427, 429 (2d Cir. 1993) and that the alleged contemnor violated the court's "edict," *King v. Allied Vision, Ltd.*, 65 F.3d at 1058, or "operative command," *Erhardt v. Prudential Group, Inc.*, 629 F.2d 843, 846 (2d Cir. 1980).[3]

Hester cannot cite any decision of this Court or any of the courts of appeals in which a party was held in contempt for violating a settlement agreement merely because it had a

---

3. As then-Circuit Judge Breyer observed for the Court of Appeals for the First Circuit:

> [T]he consequences of violating contract and decree are significantly different. To violate a promise in a private contract that settles a suit subjects a party to civil liability only. . . . The nonbreaching party may be able to obtain an order enforcing the private agreement, but without such an order, a court cannot hold the breaching party in contempt. To violate a federal court decree, however, exposes a party not only to liability for civil contempt, but to criminal contempt liability. . . . Because of the greater significance and the more serious consequences that the law attaches to violation of a court decree, it imposes requirements that the decree be specific, and it refuses to read ambiguities against a defendant.

NBA Properties, Inc. v. Gold, 895 F.2d 30, 34 (1st Cir. 1990).

provision that the district court would retain jurisdiction.[4] To the contrary, Hester's misreading of *Kokkonen* on this point was expressly rejected by the Court of Appeals for the Tenth Circuit in *Consumers Gas & Oil, Inc. v. Farmland Indus., Inc.*, 84 F.3d 367 (10th Cir. 1996). There, the district court's order specifically retained jurisdiction over the parties' settlement agreement but did not explicitly mandate that the parties comply with a provision of the agreement concerning certain press contacts. *Id.* at 369. The district court held the defendant in contempt for violating the provision of the settlement agreement concerning contacts with the press. *Id.* In reversing the contempt citation, the court of appeals rejected the argument — made here by Hester — that *Kokkonen* overruled precedents concerning the form of order necessary to render a settlement agreement enforceable by contempt:

> Consumers misreads *Kokkonen*. *Kokkonen* addresses a jurisdictional question: whether a federal district court has "inherent power" or "ancillary jurisdiction" to enforce a dismissal-producing settlement agreement. *Kokkonen* holds

---

4. Rather, the court of appeals decisions cited by Hester involved the question, at issue in *Kokkonen*, whether the federal court had jurisdiction to specifically enforce the parties' settlement agreement. *See Interspiro USA, Inc. v. Figgie Int'l Inc.*, 18 F.3d 927, 930 (Fed. Cir. 1994); *Lucille v. City of Chicago*, 31 F.3d 546, 548 (7th Cir. 1994). None of these cases considered whether the orders and settlement agreements at issue were specific enough to justify holding the breaching party in contempt. The Bankruptcy Court's decision in *In re Peck*, 155 B.R. 301, 305 (Bankr. D. Conn. 1993) is distinguishable because the agreement at issue specifically provided that it would not be effective until "approved and SO ORDERED by the Bankruptcy Court."

> that a court lacks subject matter jurisdiction to enforce a settlement absent an independent jurisdictional basis or a reservation of jurisdiction in the order dismissing the action. *Kokkonen* neither prohibits nor discourages strict construction of Rule 65(d).

Id. at 370. The court reaffirmed the basic legal principle applicable to this case that "[s]tanding alone, a settlement agreement is nothing more than a contract; the imprimatur of an injunction is required to render it a consent decree enforceable through contempt." *Id.* (quoting *D. Patrick Inc. v. Ford Motor Co.*, 8 F.3d 455, 460 (7th Cir. 1993)).

Hester's proposed construction of *Kokkonen* presents no important question of federal law for this Court to decide. At best all that is at issue is the appropriate terminology the parties should use in their settlement agreements if they desire their agreement to be enforceable by contempt. Hester simply disagrees with the court of appeals' factual treatment of this case, not any ruling of law. Moreover, given its unique facts, this case would be a particularly poor candidate for a ruling on whether violation of a settlement agreement with a retention of jurisdiction provision could be a contempt of court, because the Settlement Agreement itself excludes that possibility. The Settlement Agreement provided for only a limited retention of jurisdiction for "enforcement by specific performance," not by contempt, and specifically and clearly excluded the possibility of any "judgment, injunction or order for injunctive relief." (Pet. at 74a) If the parties truly intended to have the Settlement Agreement enforced by contempt, they would not have included these provisions.

B. The Dismissal Order Did Not "Incorporate" The Terms Of The Settlement Agreement

Hester next claims that this case is worthy of review by writ of certiorari because the court of appeals failed to find that the Settlement Agreement was incorporated into the Dismissal Order. On this issue, the court of appeals correctly ruled that parties did not incorporate the Settlement Agreement into a court order because they unequivocally provided in the Settlement Agreement that there would be no "judgment, injunction, or order for injunctive relief" entered in the case. (Pet. at 74a)

Even if the court of appeals were wrong, however, the writ should be denied. Once again, Hester is not challenging any legal principle established by the court of appeals or seeking to remedy any split in the Circuit Courts on an issue of law, it is simply challenging the court of appeals' construction of the Settlement Agreement and Dismissal Order. Among other things, Hester wants this Court to find facts from what it claims is "evidence," disregarded by both the district court and the court of appeals, and determine on appeal the parties' purported intention to incorporate the Settlement Agreement into an order — which is in direct contravention of the specific terms of the Settlement Agreement.

III.

THE COURT OF APPEALS' ALTERNATIVE RATIONALE PRESENTS NO ISSUES FOR REVIEW.

As an alternative rationale, the court of appeals held that the district court "lacked authority to impose compliance with

the settlement agreement as a condition of dismissal because that kind of condition is tantamount to a mandatory injunction." (Pet. at 11a) The court of appeals correctly noted the parties' provision in the Settlement Agreement that there would be no "entry of any judgment, injunction or order for injunctive relief" and recognized that

> [t]o construe the "Stipulated Order of Dismissal" as a court order prohibiting continued use of the WING FLINGS mark would require that we equate the dismissal order with an order requiring entry of an injunction.

(Pet. at 11a)

Hester offers no explanation as to why this Court should review this holding. It does not conflict with any decision of this Court, or any other court, and presents no important question of federal law "that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). All Hester argues is that orders that are agreed upon by the parties, such as an order under Rule 41(a)(1)(ii), need not comply with the technical requirements for an injunction, such as Rule 65 of the Federal Rules of Civil Procedure. This is incorrect,[5] yet irrelevant. Just as the parties may agree in connection with a

---

5. The courts have consistently held that Rule 65(d) applies to stipulated injunctions and consent decrees. *See William Keeton Enters., Inc. v. A All Am. Strip-O-Rama, Inc.*, 74 F.3d 178, 182 (9th Cir. 1996); *Consumers Gas & Oil, Inc. v. Farmland Indus.*, 84 F.3d 367, 370 (10th Cir. 1996); *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995) (consent decree may not be enforced by contempt unless parties can "ascertain from the four corners of the order precisely what acts are forbidden"); *H.K. Porter Co. v. National Friction Prods. Corp.*, 568 F.2d 24, 27 (7th Cir. 1977).

settlement to the entry of an order requiring one party to perform or refrain from performing some act, they may agree that no such order will be entered. That is all that happened here. An "injunction" is defined as "[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury." Black's Law Dictionary 785 (6th ed. 1990). An order compelling a party to comply with an agreement is by definition a "mandatory injunction." *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 75 (1967). By agreeing in the Settlement Agreement that no injunction would be entered, the parties agreed that no order compelling either party to comply with the Settlement Agreement would be entered. Once again, if litigants desire to have the court enforce their settlement agreements under threat of contempt, there are well established means and straightforward language that can be used for accomplishing that task. There is no need for this Court intervene in this case between sophisticated commercial parties to decide whether an order, entered pursuant to an agreement that specifies that no injunction would be entered, is really an injunction after all.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JONATHAN J. LERNER
Counsel of Record
CHRISTOPHER P. MALLOY
SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

JOHN J. CLEARY
SHUGHART THOMSON & KILROY
Twelve Wyndotte Plaza
120 West 12th Street
Kansas City, Missouri 64105
(816) 421-3355

Attorneys for Respondent